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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Respondent.

BURNS AND ROE, INC., et al.,

Petitioners,

vs.

LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, and NATIONAL LABOR RELATIONS BOARD

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS AFL-CIO

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Statement of the Case

BACKGROUND FACTS

Burns and Roe, Inc. (Burns) was the architect-engineer and general contractor for the construction of a power generator plant at Oyster Creek, New Jersey. Burns subcontracted all construction to White Construction Co. (White), Chicago Bridge and Iron Co., (Chicago) and Poirer and McLain Corp. (Poirer). Local 825, International Union of Operating Engineers, AFL CIO (the Union) had a collective bargaining relationship with Chicago and Poirer, but did not have contractural relations with Burns and White.

A dispute arose with regard to White's assignment of Ironworkers to operate a welding machine, and work stoppages occurred at the job site by the union. Burns and White filed unfair labor practice charges with the NLRB alleging a violation of Section 8 (b) (4) (B) and (D) of the National Labor Relations Act.[1]

TRIAL EXAMINER'S FINDINGS

A hearing was conducted before NLRB Trial Examiner John Funke. He found that the Union violated Section 8 (b) (4) (D) of the Act, but with respect to the Section 8 (b) (4) (B) allegation, he held as follows (A-27-28):

> . . . "2. Violations of Section 8 (b) (4) (B)
>
> The complaint, paragraphs 7(a) and (b), alleges that the conduct of Respondent as above set forth, *supra*, had among it objects the forcing of Chicago Bridge, Porier and White to cease doing business with White. There is not a scintilla of

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[1] 61 Stat., 136 73 Stat. 519, 29, U.S.C. 151 Et. Seq. set forth in relevant part in the Supplemental Appendix *infra*.

evidence to support these allegations. On this record Respondent may be found to have two objectives, (1) to force Burns and White to agree to Local 825's contract in violation of the Board's Order in the *Building Contractors'* case, *supra*, and (2) to force White to assign the operation of the welding machine to its members. Neither objective would have been furthered by a general cessation of business among the parties. Local 825 never made any request upon Chicago Bridge, Porier or White to cease doing business with Burns. Such a request would have been totally irrational for it would have simply forced Burns to employ other subcontractors which, with the possible exception of White, would not have furthered either interest of the Respondent. But Respondent never indicated it wanted White off the job—it wanted to harass White to gain compliance with its request. Nor was any demand made upon Burns to cease doing business with White. Respondent never suggested that cancellation of the contract would have served its purpose. It did inform Burns, through persons I have found to be its agents, that the failure of Burns and White to sign contracts and the assignment of the work on the job were the sources of the dispute. All Respondent wanted was the work, not a substitution of contractors nor a termination of contractual relationships between the contractors.

The General Counsel attempts to distinguish this case from *Local 825, International Union of Operating Engineers, AFL-CIO (Nichols Electric)*, 138 NLRB 540, enfd. denied, 326 F. 2d 218 (C. A. 3), by stating "there is ample evidence to show Respondent sought these objectives." The brief, which is characterized elsewhere by specificity, give no citation of fact or testimony to support this conclusion and a search of the record reveals no testimony to support it. . . . (Footnotes Omitted)"

THE BOARD'S FINDINGS

Exceptions to the trial examiner's findings concerning the Section 8 (b) (4) (B) allegation were filed and the NLRB issued its decision (A-3-14) reported at 162 NLRB 1617. The decision of the NLRB, with member Fanning

dissenting, reversed the trial examiner and held that the union violated Section 8 (b) (4) (B).[2]

THE FINDINGS OF THE COURT

The NLRB petitioned the U.S. Court of Appeals for the Third Circuit for enforcement of its Order. The decision of the Court of Appeals is reported at 410 Fed 2nd 5 (A-346-355). The Court of Appeals, in effect, applying the criteria set forth in *Universal Camera Co.*[3] held that the record did not justify the conclusion that the Union was seeking to compel one employer to cease doing business with another employer within the meaning of Section 8 (b) (4) (B) and refused to enforce that portion of the Board Order.

In this regard, the Court stated that the question to be decided was whether the union sought to compel one contractor to cease doing business with another when it engaged in conduct with the intent that the contractor (Burn) try to induce the subcontractor (White) to comply with the Union's demands (A-351). The court went on to hold that proof of coercive activity aimed at causing a neutral employer to put pressure on the primary employer is insufficient without more to establish an effort to compel the one employer to cease doing business with the other within the purview of Section 8 (b) (4) (B) of the Act (A-352).

The Board petitioned the Court of Appeals for a rehearing which was denied (A-359). White, Burns and the Board then filed the instant petitions which were granted by this Court (A-360-361).

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[2] The Board's findings appear at pages 7 through 9 of the appendix.

[3] *NLRB v. Universal Camera Co.*, 340 U.S. 474.

Summary of Argument

It is the union's contention that the statute requires that a union to be found guilty of violating the provisions of Section 8 (b) (4) (B) engage not only in prohibited conduct but also for a prohibited objective.

The question of the union's objective is one of fact and not of law. The Appellate Court below found as a matter of fact that a proscribed objective did not exist and under well established precedent the factual determinations of the Court of Appeals cannot be disturbed by this Court.

The Union further contends that the question of illegal objective is a fact which must be found and substantiated by the entire record, and is not one which can be mechanically applied on a per se basis as a matter of law. Finally, the Union contends that since this matter involved a jurisdictional dispute under Section 8 (b) (4) (D) of the Act there cannot be any violation under Section 8 (b) (4) (B). In this connection, the Union contends that the status of contractors and subcontractors on a construction site at least as it applies to the facts of this case is not truly neutral and any conduct engaged in by the Union was primary and not prohibited by the statute.

ARGUMENT

Point I

To Find That A Union Violated Section 8 (b) (4) (B) Of The National Labor Relations Act, It Must Be Established That The Union Engaged In Proscribed Conduct For A Proscribed Objective.

The statute is quite specific that to hold a Union to blame under Section 8 (b) (4) (B), the Union, must not only engage in conduct prohibited under Section 8 (b) (4) (i) and/or (ii), but that such prohibited conduct be engaged in for an object prohibited under subsection (B). In the instant case, the relevant object that must be found to have exisited is the "cease doing business" object set forth in subsection (B). This Court held in *Local 761 IUE v. NLRB, (General Electric Co.)*, 366 U.S. 667, 672 et seq as follows:

> But not all so-called secondary boycotts were outlawed in §8(b)(4)(A). "The section does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives * * *. Employees must be induced; they must be induced to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person. Thus, much that might argumentatively be found to fall within the broad and somewhat vague concept of secondary boycott is not in terms prohibited." *Local 1976, United Brotherhood of Carpenters v. Labor Board*, 357 U.S. 93, 98, 42 LRRM 2243. See also *United Brotherhood of Carpenters* (Wadsworth Building Co.), 81 N.L.R.B. 802, 805, 23 LRRM 1403.

If a Union desires that one employer stop doing business with another and makes such a request in a form that is not proscribed under (i) and (ii) there can be no violation of the statute. *N.L.R.B. v. Servette Inc.*, 377 U.S. 46.

A union has a perfect right to attempt and/or cause a cessation of business as long as it does not utilize proscribed means. On the other hand, if a union engages in conduct proscribed under Section (i) and/or (ii) such conduct is not violative of subsection (B) unless it is established that an object of the proscribed conduct was for one of the specified prohibited objectives. These legal propositions are not in dispute in this case.

The ultimate question which must be solved remains one of fact. That is, did the Union engage in any conduct for a prohibited objective. In this regard, the Union does not contend in this Court that it did not engage in proscribed conduct. The factual findings below are not now being opposed. The Union does, however, contend that an object of its conduct was not to force one employer to cease doing business with another and as a result thereof, it cannot be found to have violated the statute.

Point II

The Question Of Objective Is One Of Fact And The Finding Of The Appeals Court In This Regard Is Not Subject To Review.

It is well settled that illegal objective under Section 8 (b) (4) (B) is a question of fact and must be determined on a case to case basis. *Bedding, Curtain and Drapery Workers Union, Local 140 v. N.L.R.B.*, 2 C.A. 1968, 390 F. 2d 495.

In the instant case, the trial examiner found factually that the Union did not engage in any conduct for a proscribed objective. His factual findings were not reversed by the NLRB, but rather the Board held it is respectfully submitted that the illegal objective was present as a matter

of law.

The Appellate Court, based upon the facts in the record, found factually that the only objective which could be inferred was that the Union desired one contractor to use its influence with another to change the latter's conduct, not to terminate the relationship (A-352). The principles in the *Universal Camera* case, *supra*, require that this Court accept the findings of fact of the Appellate Court unless the standard of the substantial evidence rule applied by the Court of Appeals was grossly misapplied or misapprehended.

These factual findings this Court has held is a question which Congress has placed in the keeping of the Courts of Appeals rather then in this Court.

Nowhere, it is respectfully submitted, in the Court's opinion is there evidence of a failure of the Court to meet the tests of *Universal Camera* and accordingly for that reason it is submitted that the Court's findings be accepted.

Point III

Secondary Activity By A Union Does Not Per Se Support The Conclusion That An Objective Of The Activity Is To Force One Employer To Cease Doing Business With Another Within The Meaning Of Subsection (B) Of Section 8 (b) (4).

The thrust of the petitioners argument is that if a union engages in conduct directed towards a secondary employer regardless of its intent, it must be concluded that an object of the conduct is to force the secondary employer to cease doing business with another employer. In support of this proposition the petitioners state that if the primary employer does not accede to the union's demands then the secondary employer has no alternative but to stop doing business with the primary employer.

Petitioners also contend the Court below held that a total severence of the business relationship was necessary in order to establish a cease doing business objective within the meaning of the statute. As will be discussed in detail in this point, the argument of the petitioners in both areas is faulty.

The statute under discussion does not prohiibt all secondary activity. As this Court held in the *General Electric* case, *supra* the words "secondary boycott" do not appear in the statute. This Court held that not all secondary boycotts are prohibited by the statute, but rather only those secondary boycotts specifically set forth in the statute as being unlawful are prohiibted. This Court in several leading cases dealing with the subject matter of secondary boycotts found as a matter of fact in each of them that the union had engaged in proscribed activity to force or require one employer to terminate its contractural relationship with the other. That fact was held by the Court to exist not as a matter of law, but rather as a result of the record. This Court in *NLRB v. Denver Building Council,* 341 U.S. 675 stated that the crucial finding in that case was that an object of the union's conduct was to force or require one employer to terminate the subcontract it had with the other. This was true in *Electrical Workers v. NLRB,* 341 U.S. 694 as well as in *Carpenters Union v. NLRB,* 341 U.S. 947.

In each of these celebrated cases, this Court found as a matter of fact, that which the Petitioners herein demand be found as a matter of law per se. While these cases are of importance in the law of secondary boycotts, as a result of the findings therein, which findings are not present herein, none of those cases is in any way dispositive of the issues in this case.

If it had been found in the Court below that the Union engaged in conduct to terminate the contractual relationship between Burns and White, it would be clear under the cited cases above, that a violation of law existed.[4]

No such finding, however, exists. Indeed, the trial examiner stated to the contrary. While the Board in its reversal of the trial examiner found illegal objective, it was content to look at the effect of the conduct directed at the secondary in reaching its conclusion with respect to the object. The Court below like the trial examiner found no illegal objective.

The Court below in its decision states that without more coercive activity aimed at causing a neutral to put pressure on a primary employer is insufficient to establish a cease doing business objective. The Court is interpreting the law as it exists and is saying clearly that without a crucial factual finding as in the *Denver* case and those cases cited above, a termination of contractual relationship or a cease doing business objective cannot be established. Had the union in this case stated or had it been found as a matter of fact that the Union would require Burns to discontinue its contract with White if the latter did not accede to the Union's demands, the Court below then would have had no alternative but to find a violation of law. It refused to find *per se* that this object existed without findings of fact to establish same. This Court and other Courts have refused to follow *per se* arguments for the very reason that crucial factual findings cannot be transmitted into legal

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[4] This statement is in no way to be considered inconsistent with the Union's position herein that when a jurisdictional dispute exists the proper remedy is limited to Section 8 (b) (4) (D) and that Section 8 (b) (4) (B) is therefore inapplicable, or that the *Denver* case has been overruled as it relates to the status of contractors and subcontractors on a construction site.

findings without abuse and without the disadvantages inherent in hasty generalizations. *Local 357 Teamsters v. NLRB*, 365 U.S. 667 (1961).

For example, suppose that a Union has a dispute with a subcontractor who will not comply with its terms. Suppose further that the Union goes to the general contractor and requests that the general contractor speak to the subcontractor, the purpose thereof being to have the subcontractor comply with the general contractor's request. Suppose further that the general contractor refuses to speak to the subcontractor. Suppose further that the union says to the general contractor that it will picket the job site and cause a work stoppage unless the general contractor attempts a discussion with the subcontractor or that it does cause the general contractor's employees to strike. Whichever road the union chooses is really of no relevance inasmuch as the threat to strike or the actual strike itself would in either case be proscribed conduct under Section (ii).

In the hypothetical situation given, it is clear that the union does not desire anyone to cease doing business with anyone else but rather only desires assistance from the general contractor. The petitioner's per se theory would fail in this case.

The facts in the hypothetical do not vary from the facts in the instant case. The Union desired Burns to assist it in its dispute with White. It requested that Burns sign a contract by the terms of which White would also be bound. Burns refused. The facts establish that the union directed pressure at Burns to obtain its assistance. No factual finding was made that the union desired Burns to terminate White, and no factual finding was made that the Union desired such a result, in the alternative. While it is stated in the hypothetical that it makes no difference whether the

union threatened to strike or did, in fact strike, the petitioners contend that since the proscribed conduct took the form of a strike, disruption occurred and therefore illegal objective is present. Such a contention begs the question.

This Court held in *NLRB v. International Rice Milling*, 341 U.S. 665, that it is the object of a Union's encouragement that is proscribed by this section rather than the means adopted to make it felt. Accordingly, if there is no illegal objective in fact one cannot be found as a matter of law from the type of proscribed conduct. The petitioners rely upon a type of conduct to establish as a matter of law, the intention of that conduct. The statute does not so permit it, and the petitioner's reasoning is falacious. It's *per se* theory cannot be fortified by its falacious conclusion.

In *J. M. Miller Decorating Co.*, 156 NLRB No. 32, the Union had a dispute with a subcontractor in that the latter refused to comply with the terms of the Union. The Union approached the general contractor and threatened to picket unless the subcontractor complied. The threat to picket was proscribed conduct under (ii). However, the Board found that the union did not violate the law inasmuch as the purpose of the union was not to terminate the contractural relationship between the parties but rather that the Union was seeking to have the general contractor influence the subcontractor to have the latter comply with the union's demands.

Unlike the instant case, the Board did not contend or conclude they had the subcontractor refused to comply the union would, as an alternative, demand that the general contractor terminate its relationship with the subcontractor.

The Board did not so conclude and the supposition or conjecture which it asks this Court to adopt is not consistent with its present interpretation of the law. The

question is asked what if the union in that case struck the general contractor? The Board based upon its factual finding with regard to objective would have had no alternative but to have dismissed the complaint.

That case, it is respectfully submitted, is a perfect example of the proposition that if there is no illegal objective, in fact, illegal objective cannot be found regardless of the nature and the extent of the proscribed conduct. There are other cases which support this proposition and which are in conflict with the contentions of the petitioner. In *NLRB v. Brotherhood of Carpenters,* 261 F. 2d 166 (Wendangel & Co.) C.A. (7), the Court was faced with the exact same problem as the Court of Appeals was faced in the instant case. That Court rejected the argument that if the primary employer did not accede to the Union's demands, the union then would in the alternative request that the secondary employer cease doing business with the primary employer. The Court stated that the evidence failed to establish that the union was seeking to replace the primary employer and that an object of the union's conduct was to force or require one employer to cease doing business with another. In *Doud's v. International Longshoremen's Association,* 224 Fed. 2nd 455, 459, Circ. Judge Learned Hand in discussing object under Section 8 (b) (4) found in facts somewhat similar to the instant case, that the cease doing business objective was not present. In both cases the Courts refused to adopt a *per se* theory.

In *Retail Clerk Union v. NLRB,* 296 Fed. 2nd 368 (C.A. D.C.), the NLRB presented a *per se* argument to the Court. The union therein was charged to have engaged in conduct violative under Section 8 (b) (4) (A) and (B) of the Act as it then existed. At that time Section 8 (b) (4) (B) prohibited secondary activity to force or require an employer to recognize or bargain with a union who was

not certified by the NLRB, and Section 8 (b) (4) (A) contained the cease doing business objective. Subsequent to the amendments of the statute in 1959, that which had been formerly prohibited in subsection (A) was included in subsection (B) and at the present time subsection (B) contains both illegal objectives.

Other than the mechanical insertion of the prohibition in a different section of the Act no substantive changes have been made.

In that case, the Board found that the union violated both sections of the Act. The Court agreed that there was sufficient evidence to establish that the union engaged in illegal secondary activity for the illegal recognition object but refused to accept the Board's finding that as a matter of law, the union also engaged in illegal secondary activity for a cease doing business objective. The Board stated to the Court that all illegal recognition objectives are also illegal cease doing business objectives. The Court refused to accept that statement as being too broad and held while a union might seek recognition the Court could visualize efforts which do not seek a cease doing business objective and refused to accept the Board's proposition that a violation under one is of necessity a violation of another. See also *NLRB v. Local 1291 ILA*, 382 Fed. 2nd 375 (C.A. 3); *NLRB v. Local 164*, IBEW 388 F. 2d 105 (C.A. 3); *NLRB v. Local 825, IVOE* (Nichols Electric Co.), 326 F. 2d 213, 326 F. 2d 218 (C.A. 3 1964).

The legislative history preceding the passage of this statute contains no meaningful discussions with respect to the meaning of "cease doing business" as used therein and in no way supports the *per se* argument of the petitioners. It is submitted that the cases cited above reflect the proper interpretation of the statute.

Point IV

Where A Union Engages In Conduct Which Is A True Jurisdictional Dispute Under Section 8 (b) (4) (D) Of The Statute Such Conduct Cannot Be A Violation Of Any Other Section Of The Statute.

The Trial Examiner, the Board and the Court below found that the Union engaged in conduct violative of Section 8 (b) (4) (D) of the statute in that an object of the Union's conduct was to force White to assign work to it rather to members of another labor organization.

Board member Fanning dissented from the finding of the Board that the Union also violated Section 8 (b) (4) (B) of the Act in that in his opinion a finding of a jurisdictional dispute precludes a finding that the respondent also violated Section 8 (b) (4) (B). See *Local 5, Plumbers Union* (Arthur Venneri Co.), 137 NLRB 828, 145 NLRB 1580; *Millwrights Local Union 1102* (Dobson Heavy Haul Inc.), 162 NLRB No. 6.

Board Member Fanning citing the Supreme Court's decision in *Radio and Tel Broadcasting Engineers Local 1212 IBEW v. NLRB*, 364 U.S. 573, stated that in achieving the harmony required a mechanical interpretation of the terms primary and secondary employers cannot be utilized in a jurisdictional dispute in the building and construction industry.

He would hold that where the underlying dispute in the building and construction industry is jurisdictional the concept of secondary or neutral employers should exclude all subcontractors on the project as well as the general contractor. Applying his reasoning to the instant case, it would appear that Burns was not a neutral employer and other subcontractors performing work on the job site were

also not neutral employers. This reasoning is totally consistent with the purposes of Section 8 (b) (4) (D) and is realistic. The petitioners would argue that the holding of this Court in the *Denver* case *supra*, would preclude a finding of non-neutrality of the general contractor and the subcontractors.

It is contended that the findings in the *Denver* case are open to the accommodations suggested by Board member Fanning and more important, however, it is contended that this Court overruled the principles of *Denver* in its decision in *Carrier Corp. v. NLRB*, 376 U.S. 492 and *Electrical Workers Local 761 v. NLRB, supra.* In those cases the question of relatedness of work was the crucial determining factor. The *Denver* case, it is respectfully submitted, does not hold as a matter of law that all independent contractors on a construction site are neutral employers and *Denver* must be considered in light of the decisions in *General Electric* and *Carrier*. Support for this contention is contained in the dissenting opinion of Judge Wisdom in *Markwell and Hartz, Inc. v. NLRB*, 387, Fed. 2nd 79.

Board member Fanning's opinion in the cited cases is completely consistent with the decision of Judge Wisdom and his interpretation of *Denver*. Under the facts of the instant case, it is clear that all contractors were performing the same or similar type of work and that such work was related in accordance with the standards set forth in *General Electric* and *Carrier*.

It is therefore, respectfully submitted, that in addition to the exclusiveness of Section 8 (b) (4) (D), the Union cannot be found to have violated Section 8 (b) (4) (B), as any action engaged in was of a primary nature.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the Judgment of the Court of Appeals refusing to enforce that portion of the Order of the NLRB finding a violation of Section 8 (b) (4) (B), be affirmed.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

Statute Involved

The relevant provisions of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq*) are as follows:

> Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> • • •
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> • • •
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make

unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft or class rather than to employees in another labor organization or in another trade, craft or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: * * *